

Study J-1404

September 1, 2009

Fifth Supplement to Memorandum 2009-34

**Statutes Made Obsolete by Trial Court Restructuring
(Material Received at Meeting)**

At its meeting on August 28, 2009, the Commission received a letter from Bart Sheela, President of the California Public Defenders Association, in connection with Study J-1404 on statutes made obsolete on trial court restructuring. The letter is attached as an Exhibit.

Respectfully submitted,

Catherine Bidart
Staff Counsel



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August 27, 2009

Catherine Bidart, Esq.
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California Law Revision Commission
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Dear Ms. Bidart:

The staff of the California Law Revision Commission has made tentative recommendations to amend Evidence Code section 731 to make expert compensation in criminal and juvenile cases a court charge. Evidence Code section 731 presently makes those costs county charges. CPDA believes this amendment is unnecessary and unwise and therefore opposes the proposed change. The amendment is fiscally unsustainable, will result in the Constitutionally-deficient provision of defense services, and is also unnecessary in light of Government Code section 77003 and Function 10 of Rule of Court 10.810.

The United States Constitution requires that the government provide indigent defendants with the services needed to adequately defend against criminal charges. Those services include supplying, at government expense, experts necessary for the defense of the case. The failure of the state to provide necessary experts violates the Due Process Clause of the United States Constitution. (*Ake v. Oklahoma* (1985) 470 U.S. 68.) It is the obligation of the court to appoint necessary experts and the county to pay the costs of those experts. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307.)

It is not an understatement to note that the State of California has an ongoing, critical budget crisis that has resulted in severe restraints upon the ability of California's Court System to fund its needs. Courts are closed one day a month, staff has been reduced and remaining employees are being furloughed, judges are remitting part of their pay, and services have been curtailed. It is not possible to predict when the budget situation will improve and in fact court officers expect significant further service cutbacks, layoffs, and additional furloughs.

The budget crisis is such that it is fiscally imprudent, irresponsible even, for the Law Revision Commission to consider transferring the entire liability for the cost of experts in criminal and juvenile cases to the courts. The amount of money at issue is significant and the courts do not have the ability to absorb the costs. In Los Angeles County alone the cost of court appointed experts in criminal and juvenile cases exceeds \$9 million dollars annually. It is imprudent for the Law Revision Commission to suggest that this exceedingly expensive liability be transferred to the court system, which has absolutely no ability to pay such costs.

Catherine Bidart, Esq.
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The inability of the courts to pay these costs will result in the provision of Constitutionally deficient defense services. Courts are required by the United States Constitution to provide indigent defendants with ancillary services, such as experts, that are reasonably necessary for an effective defense. Courts do not have the luxury of refusing to appoint necessary experts because the court does not have the money to pay for them. Defendants who are convicted after courts decline to appoint and pay necessary experts will have their convictions reversed, resulting in more work for appellate courts and retrials in the Superior Courts, increasing costs to the entire judicial system. Counties will be burdened with lawsuits alleging legal malpractice which will burden the county fisc.

In order to avoid the Constitutional infirmity the proposed amendments will cause, courts will be forced to dismiss charges or cases. For example, an indigent defendant may need the assistance of a variety of experts in order to present mitigating evidence in the penalty phase of a death penalty case. If the court has no ability to fund those reasonably necessary experts the court cannot Constitutionally allow a defendant to have the death penalty imposed in the face of an indigent defendant's inability to effectively defend himself (Corenevsky case). The court would be required to dismiss the death penalty special circumstances and perhaps even not allow a verdict that imposes life without the possibility of parole. Wrongful convictions occurring as a result of the inability of a defendant to rebut eyewitness identification evidence (one of the major causes of wrongful convictions) or a false confession because the defendant was denied the services of a necessary expert will, again, cost the State millions in reparations and lawsuit payouts.

There is no reason for the Law Revision Commission to proceed with the proposed amendment to Evidence Code section 731 because *existing law* already accomplishes the transfer of certain expert costs to the courts. Government Code section 77003 and Function 10 of Rule of Court 10.810 already establishes that the costs of experts appointed for the needs of the court to be court charges. There is no reason to go further and saddle the courts with expenses it cannot afford. The proposed amendment is unnecessary when existing laws are considered.

Over 4000 lawyers who are members of the California Public Defenders Association provide indigent criminal defendants and criminally accused juveniles with the Constitutionally effective assistance of counsel. Of necessity that includes petitioning the court to appoint reasonably necessary experts - experts which are Constitutionally required and which must be funded. The proposed amendment will undercut their ability to perform their core duty and will place the courts in the untenable position of being unable to fulfill their Constitutional mandates.

Very truly yours,



BART SHEELA
President
California Public Defenders Association